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THE CONFUSION IN THE LAW RELATING TO MATERIALMEN'S LIENS ON VESSELS.

ALTHOUGH the administration of the maritime law of the United States might, in many particulars, be bettered by a codification, no branch of that law is in more urgent need of legislative amendment than is the law relating to materialmen's liens. It is the purpose of this article to discuss some features of the confusion which exists at present in that division of the maritime law, and to point out the remedy therefor.

The difficulties and anomalies which have arisen can be traced for the most part to three cases decided by the Supreme Court of the United States.

In the first of these cases, *The General Smith*,¹ the Supreme Court reversed a decree *in rem* for supplies furnished a vessel in her home port. Mr. Justice Story explained the decision by saying that although the maritime law gave a lien for necessaries furnished to a foreign ship or to a ship in a port of the state to which she did not belong, the case was governed altogether by the state law when the necessaries were furnished in the port or the state to which the ship belonged. Inasmuch as in this case the common law of the state in which the owner lived provided no lien under the circumstances, the materialman's claim was denied. The distinction between "foreign" and "domestic" vessels, as these terms are now understood, arose as a result of this decision.

Five years later, in *The St. Jago de Cuba*,² Mr. Justice Johnson declared (1) that it was not in the power of any one except the master to give implied liens on a vessel; and (2) that when the owner is present "the contract is inferred to be with the owner himself on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived." The doctrine of presumption of credit to the owner was thereby established in the law. Whether this was an original view³ or merely

¹ 4 Wheat. (U. S.) 438 (1819).

² 9 Wheat. (U. S.) 409, 416, 417.

³ In *Wilkins v. Carmichael, Dougl.* 101, Lord Mansfield remarked: "Work done for a ship in England is supposed to be on the personal credit of the employer. In foreign parts the master may hypothecate the ship." Cf. *The Albany*, 4 Dill. (U. S. C. C.) 439, 441.

a deduction made from the decision in *The General Smith*, or whether it was in fact the theory of the court in that historic case, we do not undertake to decide.¹ In any event Judge Story was a member of the bench when the later case was decided and recorded no dissent from the law as expressed by his associate.

Finally in 1857 the same court held, in *People's Ferry Co. v. Beers*,² that a contract for the construction of a vessel is not maritime because neither made nor to be performed on the water, and hence is not within the jurisdiction of the admiralty courts.

It is generally conceded that the division of vessels into foreign and domestic ships in the matter of materialmen's liens was not only artificial, but contrary to the law of maritime Europe.³ Furthermore it was not in accord with the theory of the English law. The English admiralty did not deny the right of the materialman to proceed *in rem*. The court was simply not permitted to entertain or enforce a lien for supplies or repairs furnished within the country.⁴ The reason for Mr. Justice Story's error is largely, if not wholly, a matter of conjecture.⁵ But although the vice in his law has been made abundantly evident by the difficulties which have arisen in carrying it into effect, the doctrine of *The General Smith* has been steadfastly adhered to by the Supreme Court.⁶

¹ Cf. Johnson, J., in *Woodruff v. The Levi Dearborne*, Fed. Cas. No. 17988 (1811).

² 20 How. (U. S.) 393.

³ See Benedict, *The Am. Adm.*, 3 ed., §§ 272, 273. As expressed by Mr. Justice Brown in a recent case, the ruling in *The General Smith* was "a distinct departure from the continental system, which makes no account of the domicil of the vessel, and is a relic of the prohibitions of Westminster Hall against the Court of Admiralty." *The Roanoke*, 189 U. S. 185, 194.

⁴ See *Longyear*, J., in *The Champion*, *Brown Adm.* (U. S. D. C.) 520, 531; *The Zodiac*, 1 *Hagg. Adm.* 320, 325; 2 *Parsons, Shipp. & Adm.*, 322. In *The Underwriter*, 119 Fed. 713, 740, 742, Judge F. C. Lowell characterizes the error of Mr. Justice Story as due to the failure to perceive clearly the "difference between jurisdiction and substantive law."

⁵ See *The Brig Nestor*, 1 *Sumn. (U. S. C. C.)* 73, 74, 79, decided by Judge Story in 1831; and compare Mr. Justice Johnson's insinuation in *Ramsey v. Allegre*, 12 Wheat. (U. S.) 611, 614, 636.

⁶ *The Roanoke*, 189 U. S. 185. With one notable dissent by Mr. Justice Clifford in *The Lottawanna*, 21 Wall. (U. S.) 558, 583, Field, J., concurring. In 1858, by amendment of the 12th Admiralty Rule, the right of the materialman to proceed *in rem* in the case of domestic vessels was taken away, and Chief Justice Taney explained the alteration as due to the fact that the previous practice authorizing such procedure was found to be inapplicable to our mixed form of government, saying in *The St. Lawrence*, 1 Black (U. S.) 522, 530-1: "If the process *in rem* is used wherever the local law gives the lien, it will subject the admiralty court to the necessity of examin-

The decision in *Ferry Co. v. Beers* was quite as much in conflict with the best practice of continental Europe as was the opinion in *The General Smith*,¹ and it has been criticized accordingly. Nevertheless the Supreme Court has just refused to modify its first ruling.²

While less fault has been found with the expressions in *The St. Jago de Cuba*, they are equally objectionable, and it is evident, from a study of the lien law of the country in its present state, that the effect of the case has been no less fatal than that of *The General Smith*. Neither of Mr. Justice Johnson's statements—that when the owner is present the contract is assumed to be made on his individual responsibility, and that only the master can impress the vessel with an implied lien—seems to be duplicated under the continental system, at least in the law of France. The older continental codes are far from explicit on the subject of materialmen's liens. Indeed we sometimes wonder whether modern jurists have exactly interpreted the old sea laws in this particular.³ Generally speaking, such articles as are contained in them deal with "express" rather than with what we now term "implied" liens.⁴

ing and expounding the varying lien laws of every state, and of carrying them into execution." This is precisely what has happened, and it is not difficult to agree with the learned judge that such duties "are entirely alien to the purposes for which the admiralty power was created." Furthermore, it has not always been easy to determine in just what instances the local laws are applicable,—in other words to decide when the vessel must be said to be "domestic" and when "foreign." And this is an important consideration, for if the materialman proceed upon the wrong theory in the first instance he may be precluded after an adjudication from taking the proper steps. See *The New Brunswick*, 125 Fed. 567. The wonder is that the Supreme Court, instead of attempting to dodge the issue, did not overrule *The General Smith* at the first opportunity. *The St. Lawrence* was before the court in 1861, and in 1874, after the 12th Rule had been restored to its original compass, a splendid chance was lost with the decision in *The Lottawanna*.

¹ *Consulato del Mare*, c. 32; 2 *Boucher's translation*, 38 (1808); *Cleirac, Us et Coutumes de la Mer*, 1661 ed., 419; *Ordonnance de la Marine*, Liv. I, t. XIV, Art. XVII; 1 *Valin, Com.*, 113, 367; 2 *Émérigon, Traité des Assurances et des Contrats à la Grosse, Boulay-Paty ed.*, c. XII, § 111; *Code de Commerce*, Art. 191; 1 *Boulay-Paty, de Droit Com. Mar.*, 121-2; *Goirand, French Commercial Law*, 2 ed. (1898), 250, 594; *Benedict, Adm.*, § 264.

² *The Winnebago*, 205 U. S. 354 (April 8, 1907).

³ Thus, while it is stated by Mr. Justice Curtis in *The Young Mechanic*, 2 *Curt. (U. S. C. C.)* 404, 408, that "privileged hypothecations were tacitly conferred" under the general maritime law of Europe "in cases in which what we term liens now exist" the learned judge admits that "we do not find their precise nature described in any of the ancient collections of sea laws."

⁴ But note *The Consulato*, c. 34, 2 *Boucher*, 40. And see *Cleirac, 1661 ed.*, 401, 419; *Benedict, Adm.*, 144.

The Marine Ordinance of Louis XIV, however, which has been regarded as largely a codification of the law then existing, and especially the modern French code, enumerate specifically the nature and rank of privileged claims, including the claims of materialmen.¹ Under those provisions both the *place* where the contract is made and the position of the *person* ordering the necessities appear to be immaterial, provided such person has the requisite authority.² No presumption of individual credit arises with the owner's presence. Moreover, an agreement by a prospective owner for the construction of a ship gives rise to a privileged claim on the *res* without further stipulation, and his order² or authorization seems to be essential to create a lien for supplies and repairs to the completed vessel at his place of residence.³ From the earliest times the continental law has placed restrictions on the authority of the master when at the place where the owner lives.⁴ And under the Code de Commerce the master, when at the place of residence of the owners or their agents, cannot furnish his vessel without "special" authorization.⁵ In a sense, therefore, the presence of the owner under the French law does affect the existence of a lien for necessities, but not as it does in this country. Instead of being the person who alone can impress the ship with an implied lien, the French master, generally speaking, can do so of his own right only when away from the owners. When the owner has absented himself without delegating his powers to any one, the master is assumed to be authorized to provide what he deems necessary for the vessel.⁶ And we are told by M. Boulay-Paty that the debt is privileged when the master has supplied the ship at the owner's home without special authority, if he was charged with the duty of equipping and repairing the vessel.⁷ If there are

¹ See Ordonnance de la Marine (1681), Liv. i, t. XIV, Arts. XVI, XVII; 1 Valin, 362, 367; Code de Commerce, Art. 191; 1 Boulay-Paty, 110, 121; 1 Cresp., de Droit Mar., 104 *et seq.*; Goirand, 250, 593-4; 3 Kent, Comm., 14 ed., *169, n. a.

² See the case "Havre," 19 Rev. Internat. du Droit Mar. 61 (1903).

³ In the construction of a vessel it has been said that if the owner enter into an engagement with an independent contractor to build the ship for a lump sum, the workmen of the latter have no personal claim against the owner, but against the *res* only. The contractor alone has a double claim against both ship and owner. 2 Pardessus, Cours de Droit Com., 6 ed., de Roziere, § 943; and see § 954.

⁴ Consulato del Mare, c. 239; 2 Boucher, 388; Laws of the Hanse Towns, Arts III and IV; Cleirac, 197; Ordonnance de la Marine, Liv. ii, t. I, Art. XVII; 1 Valin, 439; 2 Emérigon, 450 *et seq.*; 2 Pouget, de Droit Mar., 237 and 251.

⁵ Art. 232; 2 Boulay-Paty, 51-2; Goirand, 263, 602.

⁶ 2 Pardessus, § 630.

⁷ 1 Droit Com. Mar., 122.

cases where the materialman is assumed to have credited the owner because he dealt with the latter personally, the materialman seems, nevertheless, to be entitled to a lien by showing that he trusted the ship and by substantiating his claim in the manner provided by law.¹

But whether in accord with the law of maritime Europe or not, the theory that the presence of the owner militates against the existence of a lien for necessaries is firmly imbedded in our law. We believe, furthermore, that it furnishes the governing reason why local statutes are deemed necessary in the case of supplies or repairs furnished in the home state, now that Judge Story's exposition of the law has been discredited. Whether it is the opinion of the courts that no lien attaches to a domestic vessel because it is assumed that the owner alone is credited, or because only the master has power to impress the ship with implied liens and this power is assumed to end when the owner is at hand, is, perhaps, not quite clear, but the latter proposition would seem to be better founded. It must be remembered, however, that the presumption in the case of domestic vessels is conclusive.²

Mr. Justice Clifford attempted to correct Johnson's law as well as Story's and was partially successful. Speaking of the master's powers in the matter of necessaries, he said:³

"It is no objection to his authority that he acted on the occasion under the express instructions of the owner, nor will the lien of those who made the repairs and furnished the supplies be defeated by the fact that his authority emanated from the owner instead of being implied by law."

"When the owner is present the implied authority of the master for that purpose ceases, but if the owner gives directions to that effect the master may still order necessary repairs and supplies, and if the ship is at the time in a foreign port, or in the port of a state other than that of the state to which she belongs, those who make the advances will have a maritime lien, if they were made on the credit of the vessel."

This brings us nearer to the continental theory. If we may assume further that the debt is privileged if the owner *tacitly* consents to contracts made by the master in his presence, an important question has been settled.⁴ As is true of so many features of the law

¹ See "Albatros et Cormoran," 18 Rev. Internat. Droit Mar. 37 (1902). Cf. *i de Valroger*, Droit Mar., 120, § 39.

² *Stephenson v. The Francis*, 21 Fed. 715.

³ *The Kalorama*, 10 Wall. (U. S.) 204, 213.

⁴ "His mere presence would not perhaps avoid the lien, but if he buy the supplies

in this country, it cannot be said that the question is free from doubt, and difficult situations are presented, when, as is not infrequent, the master is also a part-owner,¹ and when the owner assumes the duties of master.² Furthermore, is the owner ever "present" in the person of an *agent*, and if so in the person of what agents?³

In *The Kalorama*⁴ the lien was allowed for necessaries ordered in a foreign port by the owner *in person* because of "an express understanding" that they were furnished on the credit of the steamer.

"Implied liens, it is said, can be created only by the master, but if it is meant by that proposition that the owner, or owners, if more than one, cannot order repairs and supplies on the credit of the vessel, the court cannot assent to the proposition, as the practice is constantly otherwise. . . .

"More stringent rules apply as between one part-owner and another, but the case is free from all difficulty if all the owners are present and the advances are made at their request, or by their directions, and under an agreement, express or implied, that the same are made on the credit of the vessel."⁵

This ruling was followed by a number of district judges, and the doctrine of the case afterwards restated by the Supreme Court in *The Valencia*.⁶ Mr. Justice Harlan there remarks that "in the absence of an agreement, express or implied, for a lien, a contract for supplies made directly with the owner *in person* is to be taken as made on his ordinary responsibility without a view to the vessel as the fund from which compensation is to be derived."⁷ So far as the owner is permitted to contract upon the credit of the ship the lien thus recognized appears to agree with the French law.⁸ It is to be noted, however, that the latest expression of the Supreme Court resorts to the reasoning in *The St.*

and be of credit and have the opportunity to give his own security by making contract liens or otherwise, there is no *implied* lien." *The Rapid Transit*, 11 Fed. 322, 329.

¹ *The Saratoga*, 100 Fed. 480. Cf. *Thomas v. Osborn*, 19 How. (U. S.) 22; Reed v. Pratt, *ibid.* 359.

² *The Havana*, 54 Fed. 201, 203, aff'd 64 Fed. 496.

³ *The Jeanie Landles*, 17 Fed. 91, 92; *The New Brunswick*, 129 Fed. 893-5.

⁴ 10 Wall. (U. S.) 204.

⁵ Pp. 214, 215.

⁶ 165 U. S. 264 (1896).

⁷ Pp. 270, 271.

⁸ Judge Putnam seems to regard the doctrine as novel and peculiarly American. *Cuddy v. Clement*, 113 Fed. 454, 461-2. Cf. 1 de Valroger, 120.

Jago de Cuba, and while it may be admitted that it is advantageous to permit an owner to lien his vessel without a formal contract and that the step taken is in the right direction, it cannot be said that the method provided has made easier the task of either court or counsel. Are the *agents* of the owner to be assumed to have authority to bind the ship by the "express or implied" agreement which the law requires? This inquiry is of the greatest importance, when the necessaries are, in fact, ordered by an agent, which is frequently the case. Upon this subject the American law is, as yet, undeveloped. Most of the cases in which the question appears were decided before The Valencia, and in others the point seems to be ignored by the court.¹

Some uncertainty also exists as to the precise nature of the "new" lien. One view is that since the presumption against a lien for supplies ordered by the owner in a foreign port is not conclusive, the agreement serves not to create a lien *de novo*, but only to rebut the presumption that the owner alone is credited; and that "a contract in fact for a lien" is not necessary, all that the law requires being a "common understanding" between owner and materialman "equivalent to a common intent to bind the ship."² Another view seems to be that the claim on the *res* arises by virtue of a waiver on the part of the owner of a limitation which exists solely for his benefit.³ It is apparent, however, that without some evidence of acquiescence on the part of the owner the lien does not attach—whether it is held to be created by the agreement or to arise by implication of law.⁴ And the determination of the question as to just what evidence is necessary to establish the required common understanding between the parties, has been most difficult, especially when the owner is a person of questionable financial responsibility.

The insolvency of the owner is undoubtedly of great importance,⁵ at least if the state of the owner's finances were known to

¹ Compare *The Mary Morgan*, 28 Fed. 196, and *The Westover*, 76 Fed. 381, with *The Patapsco*, 13 Wall. (U. S.) 329, and *The Philadelphia*, 75 Fed. 684, 687 (Lampers' Case). And see *The Ludgate Hill*, 21 Fed. 431; *The Sulioite*, 23 Fed. 919, 926.

² *The Ella*, 84 Fed. 471. But *cf.* *The Mary Morgan*, 28 Fed. 196; *The Westover*, 76 Fed. 381.

³ *The Underwriter*, 119 Fed. 713, 757.

⁴ See *The Iris*, 100 Fed. 104, 110 (C. C. A., First Circ.); *The George Farwell*, 103 Fed. 882, 883-4 (Second Circ.); *The Havana*, 92 Fed. 1007 (Third Circ.); *Alaska Co. v. Chamberlain & Co.*, 116 Fed. 600, 602-3 (Ninth Circ.).

⁵ *The Newport*, 107 Fed. 744, 748.

the materialman when he sold the necessaries in question, and if considered in connection with the other circumstances of the case. But there is danger that the effect of insolvency will be allowed to crystallize into a presumption,¹ and a superabundance of presumptions is already one of the most conspicuous evils in the law as administered in this country.² Why should the fact of the owner's insolvency be more conclusive of credit to the vessel than a charge or entry made in the books of the materialman, which is admittedly not controlling?³ Indeed, the admission of inferences to establish the required agreement has led to expressions of doubt concerning the wisdom of the doctrine of *The Kalorama*.⁴ Finally it may be pointed out that if an agreement for a lien is absolutely necessary when the owner orders in person, the circumstance that the materialman may honestly suppose he is dealing with the *master* is immaterial.

We have been speaking of contracts by the owner in a foreign port. The state of the law is equally distressing in the case of supplies ordered in the home port.

In a case reported in *Flippin*,⁵ Judge Hammond held that as the Tennessee statute did not say credit to the vessel was necessary it would be an "interpolation" to add the condition, and he accordingly allowed the liens claimed, notwithstanding his finding that the proof did not rebut the presumption of credit to the owner. In *The Samuel Marshall*⁶ this question was carefully considered by the Circuit Court of Appeals for the Sixth Circuit, and the conclusions in the earlier case expressly disapproved. The court

¹ Cf. Hughes, *Handbook of Admiralty Law*, 93; *The Advance*, 72 Fed. 793, 798.

² The facts in *The Patapsco*, 13 Wall. (U. S.) 329 (1871), well illustrate the vicious manner in which this question of the owner's insolvency may arise. The case has been regarded as exceptional. *The Valencia*, 165 U. S. 264, 269, 270; *Stephenson v. The Francis*, 21 Fed. 715, 722. It is at least an unfortunate precedent. And as an example of the conflicting impressions which the decision has made it may be said that in *The Iris*, 100 Fed. 104, 107, Judge Putnam treats the case as one where supplies were ordered by the *master*, while in *Cuddy v. Clement*, 113 Fed. 454, 460, he speaks of the supplies as "ordered by the owner" without a contract. Compare further *The Ludgate Hill*, 21 Fed. 431, *Stephenson v. The Francis*, *ibid.* 715, 722, and *The Havana*, 54 Fed. 201, 203, with *The Alianca*, 63 Fed. 726, 732, and *The Advance*, 72 Fed. 793, 798. In *The Alvira*, 63 Fed. 144, 154, Judge Morrow refers to *The Patapsco* as a decision on the question relating to the burden of proof.

³ Hughes, *Adm.*, 93. And see *The Grand Republic*, 138 Fed. 615, where the charge was made to the owner.

⁴ *The Havana*, 87 Fed. 487.

⁵ *The Illinois*, White & Cheek, 2 *Flip.* (U. S. D. C.) 383.

⁶ 54 Fed. 396 (1893).

declared that it could not be presumed that the state legislatures intended to avoid the limitations of the maritime law except "as to the foreign character of the vessel," that the obvious purpose of the local laws was to put residents of the home port on an equality with citizens of a foreign state, and therefore the lien created should be assumed to have all the other "peculiar characteristics" of a maritime lien. In this case the necessaries were ordered by the *master* in the port of the charterer, and inasmuch as there was a condition in the charter-party that the charterer should pay for them, of which the materialman had knowledge, the decision on the necessity of credit to the vessel has been treated by some courts as a *dictum*.¹ The ruling, however, was followed by the Circuit Court of Appeals for the Ninth Circuit in a case where there was no charter limitation,² and was cited with approval by Judge Addison Brown in *The Advance*,³ and by the Circuit Court of Appeals for the Second Circuit in *The Electron*.⁴ Nothing is said in any of these cases about the necessity of an "agreement" for a lien,⁵ although both *The Samuel Marshall* and *The Electron* have been referred to as deciding that evidence of a common understanding is necessary.⁶ But in *The Westover* Judge Seaman sustained exceptions to a libel for necessities furnished in the home port upon the order of the owner's agent, for the avowed reason that the evidence did not show that the credit of the vessel was contemplated by the parties in their contract.⁷ On the other hand, in *The Alvira*, Judge Morrow, though recognizing that the object of state laws was "to place domestic liens on an equal footing with foreign liens," declared that this purpose did not render them "in all respects the same," and that the rule of presumption of credit to the owner was not applicable to domestic liens, else

¹ See *The Iris*, 100 Fed. 104, 112; *The Vigilant*, 151 Fed. 747, 751.

² *Lighters*, Nos. 27 & 28, 57 Fed. 664, 666.

³ 60 Fed. 766, 767.

⁴ 74 Fed. 689, 694; the owner was here the orderer.

⁵ Cf. also *The Sappho*, 89 Fed. 366, 373-4.

⁶ Hughes, *Adm.*, § 50; Ames, *Cas. on Adm.*, 110, n. And see *The Wm. P. Donnelly*, 156 Fed. 302.

⁷ "As the maritime law imposes the presumption that credit is given to the owner personally when present at a foreign port and always at the home port, and as the statute operates to create a lien which is enforceable only according to the rules of admiralty, the effect is to make that presumption rebuttable, and thus place the domestic lien upon an equal footing with foreign liens, if the credit is so given in fact. This lien is not implied, but must rest upon a mutual contract which contemplates a credit upon the *res*." 76 Fed. 381 (Dist. Ct., E. D. Wis.).

the very object of the local law—the lien itself—would be defeated.¹ The learned judge found as a fact, however, that the necessities in question were supplied on the credit of the ship, not because of a mutual understanding, but referring to the law established by The Patapsco.² Then came the decision in *The Iris*,³ in which Judge Putnam for the Circuit Court of Appeals for the First Circuit held that under the Massachusetts law there was no necessity “of either alleging or proving that credit was given the vessel by a mutual agreement.”⁴ The court further asserted “the unrestricted power of state legislatures to create liens on domestic vessels under such limitations as each may determine,” saying: “The case in admiralty becomes complete if only the conditions of the statute which assumes to give the liens are complied with, and whether or not those conditions conform in all details to the general rules of the maritime law.”⁵ In consequence the case is cited as standing for the proposition that statutes silent upon the subject “create a conclusive presumption of credit to the vessel.”⁶

The Iris is quoted with approval in a very recent case in the Circuit Court of Appeals for the Third Circuit,⁷ which disagrees with the view taken in *The Samuel Marshall*. On the other hand, in an equally recent decision in the Second Circuit the circumstance that the case holds an opinion apparently contrary to that in *The Electron* is stated as affording the court “no reason for modifying our former opinion.”⁸ In *The Vigilant*, the first of these recent cases, the supplies were ordered by the owner, and the court says that any limitations on a statutory lien “must be sought in the statute itself”; holding that under the law of Pennsylvania “no express pledging of the credit of the vessel is required to create the lien.”⁹

We thus find a variety of opinions upon the subject under consideration, the Circuit Courts of Appeal for the Second and Ninth Circuits, at least, deciding that some evidence of credit to the vessel is necessary, Judge Seaman and perhaps the judges of the Second and some other circuits requiring a common understanding, and the Circuit Court of Appeals for the First Circuit taking the

¹ 63 Fed. 144, 149-50.

² 13 Wall. (U. S.) 329.

³ 100 Fed. 104, aff'd on rehearing 101 Fed. 1006.

⁴ Pp. 110-12.

⁵ The City of Camden, 147 Fed. 847, 849.

⁶ *The Vigilant*, 151 Fed. 747 (Jan. 30, 1907).

⁷ *The Golden Rod*, 151 Fed. 8 (Jan. 30, 1907).

⁸ Pp. 112-13.

⁹ 151 Fed. 750, 753.

position not only that no such understanding is necessary, but that in the absence of a statutory requirement the question of credit is immaterial. This was also Judge Hammond's position.

With the view that a mutual agreement is not necessary the Circuit Court of Appeals for the Third Circuit now agrees, differing with Judge Putnam on the matter of the materiality of credit by construing a state statute which says nothing with reference thereto as in effect saying that the necessities ordered "are presumed to be on the credit of the vessel unless the contrary is shown," and placing upon one undertaking to defeat the lien a burden which the court intimates can only be sustained by showing an "express repudiation" on the part of the materialman, or "an understanding between the parties that no such lien is contemplated."¹ A somewhat parallel conception of the law seems to have been in the mind of Judge Morrow, though he prescribes no particular form of evidence as necessary to prevent the lien from attaching, except that it must be shown affirmatively that credit was not given the vessel.² It seems to us that there is much in the view as thus expressed, and if we correctly interpret Émérigon, the same theory prevailed under the continental system.³

A petition to the Supreme Court for a writ of certiorari was filed in *The Iris*, and in the supporting brief it was strenuously argued that proof of credit to the vessel was essential to the establishment of a lien under a state statute—"proof enough to overcome the presumption against such credit." The denial of the petition⁴ would seem to indicate that the Supreme Court agrees that the necessity of crediting the vessel depends upon the wording of the local statute. If this is the meaning of the refusal, it is in utter disregard of earlier expressions of distinguished members of the same tribunal.⁵ It may be said, however, that the district judge found as a fact that the supplies were furnished on the credit of the vessel.⁶ And Mr. Justice Brown has since found fault with the law of the State of Washington because it

¹ *The Vigilant*, 151 Fed. 753. But see *The Rockaway*, 156 Fed. 692, 696.

² *The Alvira*, 63 Fed. 154.

³ Thus he says, speaking of a claim for the construction of a vessel, the debt is privileged unless it is shown the materialman "trusted the person and not the thing."

² Émérigon, Boulay-Paty ed., c. XII, § 111; Benedict, *Adm.*, 144.

⁴ *Woodworth v. Nute*, 179 U. S. 682.

⁵ See Bradley, J., in *The Lottawanna*, 21 Wall. (U. S.) 558, 581; Gray, J., in *The J. E. Rumbell*, 148 U. S. 1, 19.

⁶ 88 Fed. 902, 909.

gave, or at least created, the presumption of a lien "though the materials be furnished upon the order of the owner in person."¹ But whatever the view of the Supreme Court may be, the opinion in *The Golden Rod*² indicates that the question is still in dispute among the inferior federal courts.³

Perhaps a distinction may be made between necessities ordered by the master in the home state, and those ordered by the owner.⁴ But while credit to the vessel would seem to be essential on principle under our present system, as well in the case of liens claimed under state statutes as under the so-called general law, it does not seem a necessary conclusion that such a "peculiar characteristic" of the general law as the doctrine of presumption of credit to the owner must be applied regardless of the local law. Unless the state statutes are construed as effecting a change in this particular, they leave the materialman practically no better off than he was before. There was nothing on principle to prevent the owner from contracting to give the security of the vessel in the absence of local legislation.⁵ Judge Story did not say that no lien could "exist" unless conferred by the municipal law, but that none was "implied."⁶ Neither *The General Smith* nor *The St. Jago de Cuba* dealt with "express" liens. And while the lien recognized in *The Kalorama* may be said to arise, as Judge Bradford concluded,⁷ by implication of law, in fact it owes its existence to the agreement of the parties.

It is very apparent that the law suffers for want of consistency. Starting falsely, it has become a patchwork of conflicting ideas.

In the much-quoted language of Mr. Justice Johnson, the object of the recognition of an implied hypothecation of the vessel in a distant port was "to furnish wings and legs to the forfeited hull to get back for the benefit of all concerned."⁸ The security

¹ *The Roanoke*, 189 U. S. 196.

² 151 Fed. 8.

³ Cf. *The William P. Donnelly*, 156 Fed. 302, 305.

⁴ Note the language of Putnam, J., in stating the second question in *The Iris*, 100 Fed. 104, 108.

⁵ See *The Mary Morgan*, 28 Fed. 196, 200; *The Union Express*, Brown Adm. (U. S. D. C.) 537; *The Hull of a New Ship*, Davies (U. S. D. C.) 199, 202-4. Cf. Lowell, J., in *The Underwriter*, 119 Fed. 713, 756.

⁶ Cf. *The Schooner Marion*, 1 Story (U. S. C. C.) 68.

⁷ *The Ella*, 84 Fed. 471.

⁸ *The St. Jago de Cuba*, 9 Wheat. (U. S.) 416. "Maritime liens for repairs and supplies," says Putnam, J., in *Cuddy v. Clement*, 113 Fed. 454, 458, "are in the nature of safeguards against the emergencies in which seagoing vessels may be placed at

of the materialman was thus of secondary importance, and the primary object of the law was to insure the use of the vessel as an instrument of commerce. Unless the vessel was credited no lien arose, but a special agreement to that effect was not required in the case of the master.¹

The local statutes were enacted to supply a supposed defect in the maritime law and in order, it is said, that foreign and domestic vessels might be on the same footing with respect to materialmen's liens. But the history of local legislation in the United States shows that the real object of the legislators has been the protection of resident laborers and supply men. And whether or not it is essential that credit be given domestic vessels, is still uncertain.

The presence of the owner is said to interfere with the establishment of an implied lien for necessaries. When he looks for the reason the practitioner discovers that he has a choice between two theories. Perhaps only the master can create implied liens. Perhaps the vessel is domestic in every state where an owner happens to live.

In *The Valencia* the question "under what circumstances, if under any, a charterer who has control and possession of a vessel under a charter party requiring him at his own cost to provide for necessary supplies and repairs may pledge the credit of the vessel" was expressly reserved.² A lien created by the engagement of one having no authority in the premises, express or implied, would seem to possess some novelty,³ certainly if the materialman were cognizant of the facts. In *The Kate*, it is true, Judge Harlan said that if the libellant had furnished the necessities upon the order of the *master* "a different question" would be presented, but he added significantly, furnished "without knowledge or notice that the vessel was operated under a charter."⁴ Nevertheless, in a recent decision by the Circuit Court of Appeals for the First Circuit,⁵ supplies furnished a chartered vessel in a foreign port on the order of the steward were treated as contracted for by the master and a lien allowed, though it was claimed that

foreign ports." The court accordingly denied the claims made, since the owner had made a written contract for the season. And the same rule has been applied in the case of an oral contract. See *The New Brunswick*, 129 Fed. 893, 894.

¹ *The Eliza Jane*, 1 Spr. (U. S. D. C.) 152, 153; *The Emily Souder*, 17 Wall. (U. S.) 666, 671.

² 165 U. S. 264, 272. Cf. *The Kate*, 164 U. S. 458, 471.

³ *The Vigilant*, 151 Fed. 751; *The Suliot*, 23 Fed. 919, 926.

⁴ 164 U. S. 470.

⁵ *The Surprise*, 129 Fed. 873.

the libellants were expressly informed or put on notice of the condition in the charter-party. The opinion lays great emphasis upon the character of the necessaries furnished the vessel, and *The Kate* and *The Valencia* are distinguished as of narrow application. In the District Court Judge Lowell dismissed the libels because of his belief that the materialmen were chargeable with knowledge of the charterer's obligation.¹ And the same learned judge denied the lien in another and similar case, since the supplies were not furnished in a "port of distress," concluding, apparently, that the contract between the parties acted as a restriction upon the master's authority under ordinary circumstances.² The question may well be considered an open one.

Assuming that one dealing with a vessel of his own initiative — a trespasser or a volunteer — could not claim the security of the *res*,³ is the contract alone of importance in determining the question of the existence of a lien under our law? In other words, does the lien attach by virtue of the contract or because of the acquisition by the *res* of something of value? It seems to be unquestioned that the necessaries must at least be "appropriated" to the use of a particular vessel,⁴ but beyond this the authorities are in disagreement. Mr. Justice Nelson reversed a decree *in rem* for damages arising from the master's refusal to accept necessaries ordered by him, on the ground that the lien attaches only in cases "where the materialman or ship chandler has parted with the materials and stores and the ship has received the benefit of them."⁵ On the other hand, for the alleged reason that "in admiralty the vessel is regarded as the contracting party," Judge Hughes concluded that delivery to or for the ship was not essential.⁶ These two cases represent the extreme views.

In *The James H. Prentice*,⁷ after a careful examination of the law as to the meaning of the term "furnished" as used in the Michigan

¹ Decision not reported.

² *The Underwriter*, 119 Fed. 762-4.

³ Cf. Lowell, J., in *The Underwriter*, 119 Fed. 759.

⁴ *Sewall v. The Hull of a New Ship*, 1 Ware (U. S. D. C.) 565.

⁵ *The Cabarga*, 3 Blatchf. (U. S. C. C.) 75 (1853). Followed in *The Daniel Kaine*, 31 Fed. 746, 748.

⁶ *Aitcheson v. The Endless Chain Dredge*, 40 Fed. 253, 254. "The vessel being the contractor, when she orders machinery, materials, and repairs, she puts it out of her power to refuse to accept, or by a subsequent sale to obstruct the delivery of, the things contracted for. It is her contract for the materials which binds her, without any reference to the delivery or non-delivery of the articles bargained for."

⁷ 36 Fed. 777. Opinion by Mr. Justice Brown.

statute, and of the conflicting decisions, it was held as the sounder doctrine that it was not incumbent upon the materialman to show that the necessaries were actually used by or incorporated in the vessel,¹ although it seems to have been agreed that the term is of such import that no lien can arise from the breach of an executory contract. And in *The Vigilancia*² it was declared that there could be no delivery in the maritime sense, "so as to bind the ship *in rem*," until the goods were either actually put on board the ship or else brought within the immediate presence or control of her officers.

There is, therefore, some uncertainty as to the theory which prevails in the United States courts with respect to the act or acts which give rise to a lien for necessities and the time when the lien attaches. We do not assume that any distinction exists between supplies and repairs in this particular, and it may be that the statement of the learned judge in *The Endless Chain Dredge*,³ that the contract raises the lien, went too far. But whether the lien is held to exist by reason of the contract alone, or whether the materialman must in addition put the ship at least in a position to receive the benefits which the necessities will confer, before the lien can attach, the element of delivery does appear to be of importance, under our peculiar system, on the question of the kind of lien to be claimed. In *The Vigilancia* the necessities were shipped from a foreign port and delivered to the vessel in her home port. The materialman had not complied with the requirements necessary to the establishment of a "statutory" lien, and it was held that he had no lien under the general law, because "the place where the ship is at the time the supplies reach her is the test in all such cases."⁴ Indeed, Judge Hughes once held that the fact that the necessities were ordered in the home port did not prevent a lien under the general law when they were put on board in a foreign port.⁵ The

¹ Accord, *The Winnebago*, 141 Fed. 950 (C. C. A. 1905).

² 58 Fed. 698, 700, A. Brown, J.

³ 40 Fed. 253.

⁴ Cf. *The Cimbria*, 156 Fed. 378, 382-3.

⁵ *The Agnes Barton*, 26 Fed. 542, 543. "The lien attached while the vessel was in a foreign port. It attached as upon a foreign vessel. Its character was determined by the delivery of the sails at that port and could not be changed by the accident that the sails were made at the home port under a contract also made there." Citing *The Sarah J. Weed*, 2 Low. (U. S. D. C.) 555, 561, where Judge John Lowell states that "supplies furnished in a foreign port, though by a citizen of the state to which the vessel belongs, are foreign supplies," and "supplies furnished in the home port by a foreigner will be domestic supplies."

court ignored the circumstance that the supplies were ordered by the owner in person without an agreement for a lien, and for this reason the decision has been criticized.¹ And it seems justly criticized, although Judge Brown has attempted to distinguish this class of cases as permitting the inference "of a common intent to deal upon the credit of the ship."²

The question we have been discussing appears again in the construction of local enactments. Since the decision of the Supreme Court in *The Roanoke*³ it must be understood that the states cannot *create* liens on foreign vessels. And a vessel is said to be "foreign" when she is without the state, perhaps states,⁴ to which she belongs. What then are the limits of local authority? The ship must be within the home state when the necessaries are "furnished"; must she also be at home when the contract is made, and must the contract be made within the state?

The local statutes vary greatly. In some, as in the Maine statute,⁵ no reference is made either to the place where the contract is made or to the place where the necessaries are furnished.⁶ In other states, like Massachusetts,⁷ the local laws as worded give a lien for such necessaries only as are furnished or supplied within the state.⁸ The statute of New Jersey⁹ professes to confer a lien in case of a debt "contracted" within the state for work or materials "furnished" in the state. And by the New York Statute also the debt must be contracted within the state.¹⁰

Notwithstanding the language of the local law, however, the Supreme Court of New Jersey has held that it does not matter where the contract is made if the articles are furnished within the jurisdic-

¹ Judge Butler in *The Chelmsford*, 34 Fed. 399, 402. Cf. *The Marion S. Harriss*, 81 Fed. 964; s. c. 85 Fed. 798.

² *The Alianca*, 63 Fed. 726, 732. Cf. *The Vigilant*, 151 Fed. 747, 754.

³ 189 U. S. 185.

⁴ *The Rapid Transit*, 11 Fed. 322, 329-30; *Stephenson v. The Francis*, 21 Fed. 717, 718.

⁵ Me. Rev. Stats. 1903, c. 93, § 7.

⁶ Compare also: Conn. Gen'l Stats., 1902, § 4160; Fla. Gen'l Stats., 1906, §§ 2200, 2204; 2 Starr & Curtis, Ill. Stats., 1896, 2580; 2 Md. Pub. Gen'l Laws, 1904, 1513; 3 Mich. Comp. Laws, 1897, c. 298, 3254; 3 Mo. Ann. Stats., 1906, c. 82, 2680; Ore, 2 Bellinger & Cotton, Codes, 1816; 2 Sayles, Tex. Civ. Stats., 1897, 1218; 2 Va. Code, 1904, § 2963; 2 Wis. Stats., 1898, c. 144, 2274.

⁷ Mass. Rev. Laws, 1902, c. 198, § 14.

⁸ Compare: Miss. Code of 1906, c. 85, 895; Brightleys, Digest of Penn. Laws, 1903, 57; S. C. Civil Code, 1902, 1148; 2 Ballinger, Codes & Stats. of Wash., § 5953.

⁹ 3 Gen'l Stats. of N. J., 1966.

¹⁰ 2 Rev. Stats. Codes & Gen'l Laws of N. Y., 3 ed., 2178.

tion.¹ And the courts of New York have decided that the debt is "contracted" within the meaning of the state law at the place in the state where the necessaries are delivered to the purchaser.² In Maine it has been held that a contract for the delivery in Virginia of materials intended for a ship being built in Maine created a lien under the law of Maine, although the title to the articles passed in Virginia.³ It was stated, however, that the contract was actually made in the New England state. In a similar case⁴ the Supreme Court of Massachusetts denied a lien because they adjudged the contract to have been executed in Maryland.⁵

Referring to the "unrestricted power" of the states to create liens asserted in *The Iris*,⁶ Judge Dodge recently allowed liens claimed under the law of Maine, although he found that the petitioners "did not furnish" the necessaries to the vessel, "in the sense of the maritime law, within the State of Maine, but made delivery of them to a carrier outside its limits."⁷ This decision seems to go on the theory that the states can impress domestic vessels with liens for necessities contracted for anywhere in the world, provided they are shipped to the *res* in the home state. And unless the local laws expressly limit the lien to debts for necessities ordered within the state, the court is apparently of the opinion that the place of contract should not be confined to the local jurisdiction. This may be so. Indeed the decisions in New Jersey and New York would seem to indicate that the courts intend to ignore the expressions of the legislatures upon this subject. But in our opinion the language of Judge Hanford, used in a slightly different connection, is a better interpretation of the purposes of the local legislators. He said: "In the

¹ *Baeder v. Carnie*, 15 Vroom (N. J.) 208 (1882).

² See *Phœnix Iron Co. v. The Hopatcong*, 127 N. Y. 206 (1891); *Mullin v. Hicks, 49 Barb.* (N. Y.) 250.

³ *Mehan v. Thompson*, 71 Me. 492.

⁴ *Tyler v. Currier*, 13 Gray (Mass.) 134, 135.

⁵ The case has been distinguished on the ground that the contract was entered into without an understanding that the materials were to be used for the vessel in question. Lummus, *Law of Liens*, 1904, § 219; *The Cimbria*, 156 Fed. 383. But the court was undoubtedly impressed with the argument that the law of the place of contract must be considered upon the question of the existence of a lien. Cf. *Mehan v. Thompson, supra*, 495, where the court says: "In order to ascertain whether a given contract was made with reference to any particular law the fundamental principle is to ascertain whether the contract was made at a place within the jurisdiction of that law."

⁶ *Supra*.

⁷ *The Cimbria*, 156 Fed. 383 (Apr. 25, 1907). Cf. *The Vigilancia, supra*.

matter of liens upon vessels, it is not ownership within the state which renders the vessel subject to the statute, but the fact of the transaction being within the state."¹ At least, it is hard to believe that the legislatures intended to burden domestic vessels with liens for the benefit of non-resident materialmen. It is to be noted, however, that the more liberal interpretation of the local statutes prevents a possible "gap" between the municipal and the general law, and for this reason it is justly commendable. It may also be said that if the place where the necessaries reach the ship is the sole test, the *res* may likewise be without the local jurisdiction when the contract is made.

These are matters which the highest federal tribunal has yet to decide. The Supreme Court has been able to avoid some questions growing out of the construction of state statutes because of their alleged non-federal character,² but the cases will not always appear before them on writs of error from state courts. And meanwhile the inferior federal courts are saddled with the task of solving most intricate and unnecessary problems, because of the anomalous dual system now maintained in this country.

We do not assume to have treated all phases of the law of materialmen's liens or to have mentioned all the existing difficulties in the way of the interpretation and enforcement of such liens. But it is not too much to say that the need of a change in the law is abundantly evident. The diversity of the state statutes would alone justify action. Further, the large number of courts having jurisdiction of admiralty causes under our judiciary system tends to frequent conflicts of authority, and the amount involved in lien cases is ordinarily so small that appeals are seldom prosecuted to Washington.³ And since the Supreme Court has shown no disposition to correct previous errors, the only hope for the future lies with Congress.

What then should be the character of congressional legislation? That the eradication from our admiralty jurisprudence of the dis-

¹ *McRae v. Bowers Dredging Co.*, 86 Fed. 344, 350.

² See *The Winnebago*, 205 U. S. 354, 360.

³ It was not until 1897, in the case of *The Glide*, 167 U. S. 606, that the question of the constitutionality of the state laws in so far as they authorized a proceeding *in rem* in local courts was specifically determined, and a still longer time elapsed before the power of the states to legislate with reference to liens on foreign vessels was squarely in issue before the Supreme Court. *The Roanoke*, 189 U. S. 185, 196, 198-9 (1903).

tinction between "foreign" and "domestic" vessels should be the first aim of a remedial enactment may be assumed. Further, it has been a chief object of this article to demonstrate the disturbing influence of the doctrine of presumption of credit to the owner. No attempt to rectify the law of materialmen's liens will be of real value if it does not change the rule of *The St. Jago de Cuba* and *The Valencia*, as well as that of *The General Smith*. It has also been shown that the law in regard to the essential elements in the creation of a lien for necessities is, in general, much confused, and we are accordingly convinced that federal legislation will not be successful unless it proceeds upon one of two theories: either (1) that all repairs upon or necessities delivered to a vessel by order of a person in authority shall give rise to a claim on the *res* without reference to the matter of credit; or (2) that no lien shall exist in the absence of an express agreement therefor, evidenced preferably by a writing.

It is of course to be understood that under the first alternative the lien may be waived by the materialman, and that an adequate stipulation between the parties that the necessities are not to constitute a claim on the ship will prevent the lien from attaching. The abandonment of the requirement of credit is suggested to assist in the settlement of the question of the origin of the lien, and because its enforcement in the past has been little better than a farce. The average materialman assumes, without knowing exactly why he does so, that the vessel he repairs or supplies is liable for his demands. When he is asked, as a witness in a particular case, whether or not he credited the ship, it is very easy for him to say honestly, in the light of his vague beliefs, that he did. In practice he may have charged the debt to the vessel, but in the majority of cases the question of "credit," strictly speaking, does not enter his mind when he makes the repairs or fills the orders that are left with him. Continually troublesome, what is the advantage of an insistence upon the theory?

With respect to the second alternative it is to be noted that the provisions of Article 192 of the present French Code go far toward making the claim recognized an express lien.¹ Judge Lowell has shown that there is authority for the statement that under the Roman law an express agreement to create a lien was necessary.²

¹ *i* Cresp., 119 *et seq.*; *2* Pouget, 541 *et seq.*; *1* de Valroger, 92; Goirand, 252 & 594.

² *The Underwriter*, 119 Fed. 715.

May we not also inquire whether there is any urgent reason why *implied* liens for necessaries should longer be recognized? The law which we administer was developed at a time when news travelled slowly. Today when communication can readily be effected with all parts of the world, do "the necessities of commerce" still demand the enforcement of the ancient rule?

Within the present century two bills have been introduced into Congress for the purpose of amending the law of the country with respect to materialmen's liens. The first, drafted by a committee of the Maritime Law Association of the United States, is generally consistent with existing American theories.¹ The bill, however, did not meet with universal approval, and consequently a second measure, containing features which can be traced to the French law, was introduced in the Senate the following year.² Nothing further has been accomplished, apparently because of the disagreement among those interested in the subject, but it ought not to be difficult to draft a statute satisfactorily correcting the most vital defects in the law, and securing uniformity throughout the country. Could the doctrine of *Ferry Co. v. Beers* be included as one of these defects and the voice of the case silenced in a constitutional manner, thus finally disposing of the rights of the states in the premises, the achievement would be complete.³

The authority of Congress to legislate with respect to liens on domestic vessels seems to be generally assumed,—at least, it has never been seriously questioned.⁴ The Supreme Court, however, has frequently asserted that under the Constitution the scope of the admiralty and maritime jurisdiction is a matter for the federal courts alone and cannot be affected by either the states or Congress.⁵ Inasmuch, therefore, as the highest federal court has but just reiterated⁶ that an agreement to build a vessel is not maritime, it may be doubted whether Congress could attach a maritime lien to the contract and make it enforceable in the admiralty courts.

¹ Senate Bill No. 6488; House Bill No. 15803, introduced Dec. 9, 1902.

² Senate Bill No. 160, Nov. 11, 1903.

³ Note the opportunity for conflict between the state and federal courts under the present anomalous conditions. Lummus, *Liens*, § 214.

⁴ See Mr. Justice Bradley in *The Lottawanna*, 21 Wall. (U. S.) 577-8, 580-1; Hammond, J., in *The Rapid Transit*, 11 Fed. 326, 330; Hughes, Adm., 102.

⁵ *The St. Lawrence*, 1 Black (U. S.) 522, 527 (*cf.* *The Lottawanna*, 21 Wall. (U. S.) 575-6, Bradley, J.); *The Belfast*, 7 Wall. (U. S.) 624, 640-1; *The Roanoke*, 189 U. S. 198. Note also Mr. Justice Brown in *The Blackheath*, 195 U. S. 361, 369.

⁶ *The Winnebago*, 205 U. S. 354.

But the situation is indeed unfortunate if, for the reason that the Supreme Court has declined to disturb a ruling founded upon a narrower view of the limits of the admiralty jurisdiction than is recognized in continental Europe, we are powerless to incorporate into the law of the United States an ancient provision of the maritime law of continental countries generally considered wise and correct in theory.¹

In any event it is hoped that some action will at once be taken, and if this article serve to reawaken interest in the subject to the end that Congress be induced to rescue the law from its present state—if only in part—it will have accomplished its full purpose.

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¹ See Holmes, J., writing the opinion of the court in *The Blackheath*, 195 U. S. 364. And compare *The Lottawanna*, 21 Wall. (U. S.) 576-7; *The Roanoke*, 189 U. S. 198; *The Chusan*, 2 Story (U. S. C. C.) 462.